

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 1044 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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HALDAR VIBHAG SAHAKARI GINNING& COTTON SALE SOCIETY LTD. -

Applicant(s)

Versus

MANHARLAL MOHANLAL SHAH - Opponent(s)

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Appearance :

MR BS PATEL for Applicant(s) : 1, MRS RANJAN B PATEL for Applicant(s) : 1,
MR UI VYAS for Opponent(s) : 1, 1.2.1, 1.2.2

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 22/02/2006

ORAL JUDGMENT

The petitioner-original plaintiff in Special Civil Suit No.169 of 1986 filed in the Court of the learned Civil Judge (SD), Bharuch is before this Court

complaining about the order passed by the learned 3rd Joint Civil Judge (SD), Bharuch in Special Darkhast No.40 of 1995 dated 28th July 1997. The learned Judge is pleased to allow the application (Special Darkhast No.40 of 1995, exh.1) and ordered that a warrant be issued against the opponents (in Darkhast) for a sum of Rs.3,56,330/- (Rupees three lakh fifty six thousand three hundred and thirty only) plus Rs.15,826.45 (fifteen lakh eight hundred twenty six and paise forty five only) towards cost, on interest at at the rate of 12% per annum from the date of decree. The learned advocate Mr.Patel appearing for the petitioner invited attention of the Court to the application (exh.1-Special Darkhast No.40 of 1995) and printed form filed in the Court of the learned Civil Judge (SD), Bharuch by the respondent herein-Amit Traders (partnership firm). The form was filed on 4th December 1994, wherein the operative part of the judgement and order dated 8th April 1994 is quoted.

The learned advocate also invited attention of the Court to the order passed in that Darkhast, which is under challenge. The learned Judge has recorded in para 6 that it was pointed out to him that an appeal is pending

before this Court against the judgement and decree passed in Special Civil Suit No.169 of 1986, and that this Court has not granted any stay against execution of the decree.

2. The learned Judge has taken into consideration the submission made on behalf of the present applicant that as per the decree the claim of the applicant-original complainant is allowed qua bills bearing Marks 30/1 and 30/16, which were given exhibits 124 to 139. The total of these bills comes to Rs.27,27,950/- (Rupees twenty seven lakh twenty seven thousand nine hundred fifty only). The learned Judge appreciated another important fact that the suit was filed only for a sum of Rs.11,30,845-88 (Rupees eleven lakh thirty thousand eight hundred forty and paise eighty eight only). Not only that the learned Judge while passing a decree in Special Civil Suit No.169 of 1986 was pleased to allow the counter-claim of the defendants. The learned Judge therefore, rightly observed that he cannot go behind the decree. The learned Judge after appreciating various decisions cited before him held that on a plain reading of the decree it is clear that the learned Judge in passing the decree in Special Civil Suit No.169 of 1986

has stated in so many words that the defendants are entitled to recover Rs.3,56,330/- with 12% interest till the date of realisation. That being so, the learned Judge has passed the order which is challenged in this Civil Revision Application.

3. Mr.Patel, the learned advocate submitted that the judgement and decree passed in Special Civil Suit No.169 of 1986 is challenged by the present applicant-original plaintiff by filing First Appeal No.3600 of 1995 which is admitted. Mr.Patel also invited attention of the Court to the order passed in Civil Application filed in the aforesaid First Appeal being Civil Application No.5280 of 1996. In Civil Application it is prayed that:

“5(a) To stay further proceedings of the said Darkhast No.40 of 1995 pending in the Court of the learned 5th Joint Civil Judge (SD), Bharuch.”

The learned advocate made available a copy of the order passed in Civil Application No.5280 of 1996 in First Appeal No.3600 of 1995, by Division Bench of this Court (Coram: N.J. Pandya & A.R. Dave, JJ.) on 11th July 1996,

it reads as under:

"Orig. defendants have already filed execution application. Looking to the tenure (sic.) of final order and decree drawn up, the learned Judge seems to have granted in favour of both. They are unable to write the exact amount because the learned trial Judge has referred to various exhibits from which the amount is to be derived. Under the circumstances, it is obvious that both are entitled to file execution against each other. They may do so, if they are so advised and if there is any objection in respect of execution application filed by the respective party, that may be filed before the executing court and which we are sure, will be decided by the executing court in accordance with law.

Under the circumstances stay is not granted."

4. The learned advocate for the applicant submitted that in light of the aforesaid present order 'issuing warrant' is required to be quashed and set aside.

5. At one stage, Mr. Patel, learned advocate for the applicant requested that this Civil Revision Application be tagged with First Appeal No.3600 of 1995.

The Court did not find any reason to tag the said First Appeal with the present Civil Revision Application, because in this Civil Revision Application order dated 28th July 1997 is under challenge, that too in a second round. Earlier order dated 1st December 1994 was challenged in Civil Revision Application No.1286 of 1995, but then the same was allowed to be 'dismissed for non prosecution'. The reasons can be culled out from the order passed in Civil Revision Application, namely,

“Since there is a possibility of settlement,
S.O. To 23rd June 1997.

17/4/97 (Y.B. Bhatt, J.)”

After exploring the possibility of settlement when no settlement could be arrived at, the matter was allowed to be 'dismissed for non prosecution'.

6. Mr. Vyas, the learned advocate appearing for the opponent- original defendant submitted that the learned

Judge has taken care of all the points which were raised before the Court for consideration. He submitted that it is mentioned in the decree that 'this suit is partly allowed with counter claim' of the plaintiff' as per Exhibits 124 to 149 is granted with 12% interest (sic., Exhibits 124 to 139). [clarificatory Note : In the Form produced at Page 6 of the memo of petition, the figure mentioned is 149, whereas in other pages which are placed at page nos.12 to 15, the figure mentioned is 139.].

On the other hand the defendants' claim is granted as per Exhibits 166 to 174 with 12% interest.

Finally, it is stated that the defendants are entitled to recover a sum of Rs.3,56,330/- with 12% interest till the date of recovery.

7. The learned advocate Mr.Vyas submitted that these very applicants had earlier approached the learned Judge by filing an application under section 152 of the Code of Criminal Procedure, which was given number as Exhibit No.221. The same was decided by an order dated 1st December 1994. There, the learned Judge considering the contents of the application and the rival submissions of

both the sides, had decided that the application is devoid of any merit, accordingly the same was rejected. The learned Judge was pleased to direct the plaintiffs and the defendants to bear their own cost in that application. This order of the learned Judge was challenged by way of Civil Revision Application No.1286 of 1995 before this Court. In that Civil Revision Application, the Court was pleased to issue notice on 12th January 1996 returnable on 17th January 1996, and thereafter the matter remained pending before this Court. The same was dismissed on 23rd June 1997 by this Court (Coram: D.G. Karia, J.) by passing the following order:

“Absent even in second round. Rejected. Notice is discharged.”

8. Mr.Vyas, the learned advocate submitted that thereafter the applicant did not take recourse to any other remedy. He further submitted that it is only because the applicant wants to delay the entire thing that the present Revision Application is filed challenging the order passed in Darkhast Application No.40 of 1995. Mr.Vyas submitted that contentions raised against the decree has no substance. He submitted that

the decree, if read is very clear. In any case the part of the decree which is sought to be enforced by the present respondent is very clear which says that the defendants are entitled to recover a sum of Rs.3,56,330/- with 12% interest till the date of realisation. He submitted that in that view of the matter, the present Civil Revision Application must fail and the same be dismissed with a direction that the amount deposited in the court below, be paid to the present respondents forthwith.

9. Mr.Patel, the learned advocate appearing for the petitioner in support of his submissions relied upon the following decisions:

- (i) In the matter of Ganpati Timmanna Vs. Nilkanth Sadashiv and others, reported in A.I.R. 1954 Bombay 335,
- (ii) In the matter of Kottapalli Narasamma Vs. Vedula Venkateswara Rao, reported in A.I.R. (30) 1943 Madras 667, and
- (iii) In the matter of Jugal Kishore Vs Bhagwat Sahai, reported in A.I.R. (35) 1948 Oudh 222;

The learned advocate contended that in view of the provisions of Order XXI, Rule 19 of the Code of Civil Procedure ("CPC" for brevity), the present execution application is not maintainable at all. In this regard he invited attention to Order XXI, Rule 19 of the CPC, it provides for 'execution in case of cross claim under the same decree', in the following terms:

"Where application is made to a Court for execution of a decree under which two parties are entitled to recover sums of money from each other, then --

(a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and

(b) if the two sums are unequal, execution may be taken out only by the party entitled to larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree."

The learned advocate for the petitioner vehemently submitted that if the decree is read and if the amounts of bills, exhibit nos. of which are mentioned in the

decree is made, total comes to Rs.27,27,950/-, (Rupees twenty seven lakh twenty seven thousand nine hundred and fifty only) whereas if the total exhibits mentioned qua the defendants, the total comes to Rs.15,54,485/- (Rupees fifteen lakh fifty four thousand four hundred and eighty five only). He submitted that in view of the provisions of Order XXI, Rule 19 of the CPC, the execution application should have been thrown out at the threshold.

10. The learned advocate for the petitioner could not, despite his best efforts, explain as to why there is third part in the decree which reads as under:

“Therefore, it is decided that the defendants are entitled to recover an amount of Rs.3,56,330/- with 12% interest till the date of realisation.”

11. In fact, if at all this decree is to be read, this decree can be read only in one manner, i.e. after mentioning that the claim of the plaintiffs is allowed for the amounts mentioned in Exhibits 124 to 134 (sic., at one place 139, at other place 149-at page 15 of the

memo of this Civil Revision Application) and after taking into consideration the claim of the defendants, i.e. Exhibits 166 to 174, the learned Judge came to the conclusion and drew the decree providing that the defendants are entitled for a sum of Rs.3,56,330/-. If the learned Judge has not undertaken that exercise, then this third part of the decree would not have been there. A decree is to be read as a whole and that being so this Court holds that this third part is the only operative part of the decree. Earlier two parts are the narration showing as to how the learned Judge has derived the figure of Rs.3,56,330/- (Rupees three lakh fifty six thousand three hundred and thirty only).

12. This Court is of the considered opinion that the applicant is thoroughly confused and if not he is wilfully trying to create confusion to avoid payment of specified amount mentioned in the decree. Otherwise, the decreeholder who has a decree in his favour for a sum of Rs.27,27,950/- (Rupees twenty seven lakh twenty seven thousand nine hundred and fifty only) would not have remained silent. To test the conduct of the applicant on touchstone of probability, assuming that the defendant was having a counter-claim of Rs.15,54,485/- (Rupees

fifteen lakh fifty four thousand four hundred and eighty five only), then also the applicant was to recover an amount of more than Rs.11 lakhs. Only with a view that either he recovers the full amount of Rs.27,27,950/- (Rupees twenty seven lakh twenty seven thousand nine hundred and fifty only) or nothing is not the probable conduct of a prudent man. Therefore, this Court is of the opinion that the applicant is just out to create confusion. Therefore, this Civil Revision Application fails and the same is dismissed with no order as to costs. Direct service is permitted.

13. At this juncture, Mr.Patel requested that this order may be stayed to enable the applicant to take recourse to the remedy available under the law. Mr.Patel submitted that though it is a money decree as there is a possibility that the petitioner-cooperative society may lose its amount as according to the information available, the respondent-Amit Traders (Partnership Firm) does not have any property from which this amount can be recovered.

The fact that it is a money decree, this Court finds no reason to stay operation, execution and implementation of

this order. However, to take care of the interest of the cooperative society, it is directed that the respondents herein be paid the amount of the decree deposited by the petitioner-cooperative society in the court below only on furnishing security by the respondents to the satisfaction of the court below.

This Civil Revision Application was filed in the year 1991. First Appeal was filed in the year 1995. Till date, the learned advocate has not made any request to get the First Appeal heard expeditiously, at this stage the request of the petitioners is not found worth accepting.

14. In this Civil Revision Application the scope is to examine as to whether the learned Judge has committed any error or not, especially when a First Appeal is filed before this Court and the Division Bench of this Court has not granted any stay against execution of the decree, the manner in which the decree is read and understood by the learned Judge cannot be said to be perverse, which will warrant interference at the hands of this Court.

15.If at all Division Bench while deciding the First Appeal, decides in favour of the appellants herein, then necessary consequential orders can be passed.

(RAVI R. TRIPATHI, J.)

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